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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 295.

H. P. WELCH COMPANY, *Appellant*,

v.

THE STATE OF NEW HAMPSHIRE, *Appellee*.

BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICUS CURIAE.

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7411-15 New Post Office Bldg.,
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December 16, 1938.

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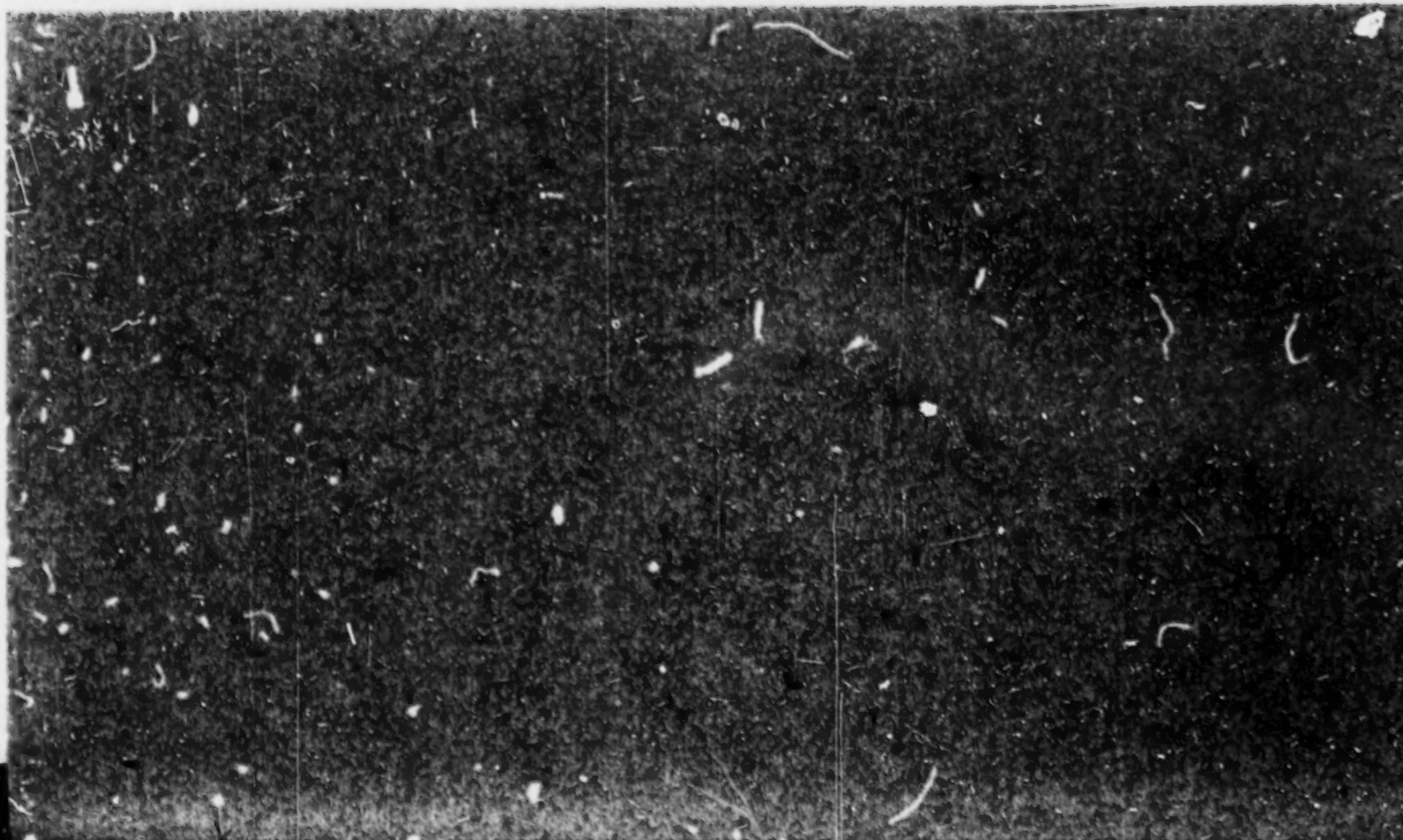

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THE STATE OF NEW HAMPSHIRE, *Appellee*.

BRIEF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States, except Delaware, which has no state regulatory commission, and New York, the commissions of which are not at present actively identified with the Association.

By the constitution of the Association, the President of the Association and the Executive Committee, or either of them, may direct the General Solicitor to appear on behalf

of the Association (as distinguished from the particular commissions represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief, by leave of court, is filed on behalf of said Association, in the general public interest, by direction of the President and of the Executive Committee of said Association.

STATEMENT OF THE CASE.

The appellant is a common and contract carrier of freight by motor vehicle over public highways in Massachusetts and New Hampshire, with terminals in both States. It holds common and contract carrier certificates under Chapter 106, Laws of 1933 of New Hampshire. Approximately 99 per cent of its business, is interstate (R. 1).

Said Chapter 106 in part provides as follows:

> "1. Declaration of Policy. The business of operating motor vehicles transporting property for hire on the highways of this state affects the interests of the public. The rapid increase in the number of motor vehicles so operated, and the fact that they are not sufficiently regulated, have increased the dangers and hazards on public highways, and regulation of common carriers and contract carriers as hereinafter defined is necessary to the end that highways may be rendered safer for the use of the general public; that the use of the highways for the transportation of property for the hire may be restricted to the extent required by the necessity and convenience of the shipper and receivers of freight, and that the various transportation agencies of the state may be correlated so that public highways may serve the best interest of the general public.
>
> * * *
>
> "8. Hours of Service. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the high-

ways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been on duty more than sixteen hours in the aggregate in any twenty-four hour period, and when the driver has been on duty sixteen hours in any twenty-four hour period it shall be unlawful for him to operate on the highways of this state until he shall have had at least ten consecutive hours off duty. Periods of release from duty herein required shall be given at such place and under such circumstances that rest and relaxation from the strain of the duties of the employment may be obtained. No period off duty shall be deemed to break the continuity of service unless it be for at least three consecutive hours at a place where there is opportunity for a rest. In case of an unforeseen emergency the driver or chauffeur may complete his run or tour of duty if such run or tour of duty, but for the delay caused by such emergency, would reasonably have been completed without a violation of this section. Provided, however, that the provisions of this section shall not apply to trucks while under the control of two licensed operators. The commission shall have authority to enforce the provisions of this section."

"3. Contract Carrier Registration. The term contract carrier as used in this act shall include every person, firm or corporation transporting property for hire by motor vehicle on any public way in this state, other than common carriers, those transporting products of their own manufacture or labor, and those exempted in section 4 of this act. * * *

"4. Exemptions. There shall be exempted from the provisions of this act: I. Motor vehicles not principally engaged in the transportation of property for hire.

II. Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period. * * *"

On April 13, 1937 the New Hampshire Public Service Commission issued to the appellant an order to show cause why its certificates, aforesaid, should not be suspended or revoked by reason of alleged violations of the statute under which they were issued. (R. 1.) At the hearing it appeared that employees of the appellant, engaged in driving appellant's trucks, were on duty in several instances for an elapsed time greater than 12 hours of continuous service. (R. 1 and 2.) The Commission, by report and order, found that the appellant had violated the statute, and ordered that all registration certificates issued by the New Hampshire Commission to the appellant "to lawfully transport property for hire in motor vehicles between points within this state (New Hampshire)" be suspended for five days. (R. 2 and 23-24.) In all operations upon which such alleged violations of the statute occurred, the appellant carried both interstate and intrastate shipments. (R. 2.) The appellant appealed from the Commission to the Supreme Court of New Hampshire (R. 2 and 24-25). That Court sustained the Commission's order on June 7, 1938, and on June 21, 1938 denied a motion for rehearing (R. 2-2 and 26-38). Thereupon appeal was taken to this Court and duly allowed (R. 24-25).

The Motor Carrier Act of 1935, 49 Stat. L. 546, provides in part as follows:

"SEC. 204. (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express uniform systems of ac-

counts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"SECTION 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

The alleged errors of the court below as assigned by the appellant are as follows:

"1. The Supreme Court of the State of New Hampshire erred in its decision in the above entitled cause in holding that sections 3, 4 and 8 of Chapter 106 as amended by Chapter 169 of the New Hampshire Session Laws of 1933 do not deny to this appellant the equal protection of the laws as guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

"2. The Supreme Court of the State of New Hampshire erred in its decision in the above entitled cause in holding that sections 8 and 11 of Chapter 106 as amended by Chapter 169 of the New Hampshire Session Laws of 1933, as applied to this appellant's operations in interstate commerce, were not superseded, and rendered void by the enactment of section 304a of title 49 of the United States Code."

SUMMARY OF ARGUMENT.

1. The Supreme Court of New Hampshire did not Err in Holding that the New Hampshire Statute Does not Deprive Appellant of the Equal Protection of the Laws.

2. The Supreme Court of New Hampshire did not Err in Holding that the Applicable Provision of the New Hampshire Statute Had Not Been Superseded.

The field covered by the New Hampshire statute had not been occupied by the Federal government at the time of the operations penalized by the order of the New Hampshire Commission.

The New Hampshire Statute is not a regulation of interstate commerce.

A State law enacted in the exercise of the police power may be held superseded by a Federal statute only to the extent that such law interferes with or is contrary to the Federal statute.

Congress in the Motor Carrier Act has established no standards for the government of the Interstate Commerce Commission in the promulgation of regulations to displace State police laws.

Public highway are instrumentalities of government; and State laws made to secure their preservation and safe use may not be destroyed by Congress.

The authority granted to the Interstate Commerce Commission in said Section 204(a) was not designed to empower the Commission to displace State police regulations established for the protection of the highways, and of persons and property thereon.

Appellant's construction of the Motor Carrier Act would deprive the States of power to protect public safety on the highways, and would convert the United States District Courts into petty police tribunals.

Acts which violate Federal regulations governing the operation of interstate motor carriers may be punishable under both Federal and State laws.

ARGUMENT.

1. The Supreme Court of New Hampshire did not Err in Holding that the New Hampshire Statute Does not Deprive Appellant of the Equal Protection of the Laws.

The first alleged error specified by the appellant is that the court below erred in holding that the exemption provisions of the New Hampshire statute do not operate to deny to the appellant the equal protection of the laws.

We believe that these exemption provisions are clearly valid under various decisions of this court which have been cited in the brief filed for the State of New Hampshire. We concur in the discussion of said first alleged error contained in that brief, and do not seek to add anything thereto.

2. The Supreme Court of New Hampshire did not Err in Holding that the Applicable Provision of the New Hampshire Statute Had Not Been Superseded.

The field covered by the New Hampshire Statute had not been occupied by the Federal government at the time of the operations penalized by the order of the New Hampshire Commission.

The Motor Carrier Act of 1935 itself imposed no limitation of hours of labor of employees. Section 204(a) of the Act provides only that the Interstate Commerce Commission "may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment."

The mere conference of this power upon the Interstate Commerce Commission, in the absence of action by the Commission, does not affect the power of a State to enact legislation deemed by it to be necessary for the protection of its citizens. *Missouri Pacific Railway* v. *Larabee Mills Co.*, 211 U. S. 612, 623; *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Commission*, 297 U. S. 471.

It is not claimed that any regulation of the Interstate Commerce Commission, made under the authority of Section 204(a), was in effect at the time of the operations which have been penalized by the order of the New Hamp-

shire Commission. There is nothing in the printed record touching this matter, except the reference in the opinion of the Supreme Court of New Hampshire to the order of the Interstate Commerce Commission made in *Maximum Hours of Service of Motor Carrier Employees*, 3 I. C. C. Motor Carrier Reports 690. That order was originally made to become effective July 1, 1938, but the effective date has been from time to time postponed, so that it now stands as December 1, 1938.

It will thus be seen that this case falls clearly within the rule of the *Larabee Mills case* and the *Northwestern Bell Telephone Co. case*, cited above.

Furthermore the Motor Carrier Act of 1935 itself supplies evidence to the effect that Congress did not design to exclude State regulation of hours of service, pending further legislation by Congress.

Section 202(c) explicitly provides that nothing in the Act shall be construed to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways. Section 216(e) reiterates the provision as respects intrastate rates, and Section 205(a) and (g) provides for cooperation between the Interstate Commerce Commission and State commissions, and gives the representatives of the State boards a part in the administration of the Act. These provisions are significant because they show a solicitude for all practicable preservation of State powers which is quite inconsistent with an intent to strike down State regulations designed for the protection of the public safety without the provision of substitutes therefor.

There is, however, a very significant additional provision bearing directly upon this very matter of hours of service. Having provided in Section 204(a) that the Interstate Commerce Commission "*may* establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees and safety of operation and equipment," the Congress included this further provision:

"SEC. 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

At the time the Motor Carrier Act was passed 43 State statutes were in effect respecting the matter of hours of service of employees, as appears from the report of the Interstate Commerce Commission in *Ex Parte MC-2*, 3 I. C. C. Motor Carrier Cases, 665,683. Congress knew this. It apparently felt that Federal regulation in the same field might or might not be necessary, but it was uncertain what regulations, if any, should be imposed. Hence, while undertaking to grant power to the Commission, as provided in Section 204(a), it did not require exercise of that power, and did not undertake to prescribe standards to which the Commission should conform such regulations as it might promulgate; and it left it to the Commission either to act, without the establishment of standards by Congress, or to report back to Congress that no need for action existed, or to recommend further legislation.

The appellant's contention that the provisions of Section 204(a) were designed to effect an exclusive immediate occupation of the field of regulation as respects "qualifications and maximum hours of service of employees, and safety of operation and equipment" would leave no room for the assignment of an effective purpose to the provision of Section 225 as respects the same matters. Such a construction is not permissible.

"No rule of statutory construction has been more definitely stated or more often repeated than the cardi-

nal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, Sec. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783." (*Ex Parte Public National Bank,* 278 U. S. 101, 104, *Ginsburg and Son* v. *Popkin,* 285 U. S. 204, 208.)

The appellant, in support of this contention, relies upon *Northern Pacific Railway* v. *State of Washington,* (222 U. S. 370). In that case this Court held that the enactment of the Hours of Service Act of March 4, 1907, operated to exclude State regulation of hours of service even during the year for which the effect of the Act was postponed. The Hours of Service Act, however, differed in a very marked way from the Motor Carrier Act of 1935. The earlier statute, by its own provisions, determined the limitation of hours, and prescribed when they should become effective. Examination of the statute, read in the light of the report of the House Interstate and Foreign Commerce Committee, which reported the bill, showed that it was the intent of the Act to leave hours of service unlimited till the effective date named in the statute. On this point the Court said:

"In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision, if it was contemplated that the prohibitions of state laws should apply in the meantime. * * * In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act,—a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which caused it to be enacted. Finally, the convictions which arise from the fact of the postponement are made plain by a report on the bill, made to the House of Representatives by the Committee on Interstate and Foreign Commerce, wherein

it was said (Report No. 7641), dated February 16, 1907, p. 6:

> 'Owing to the probable necessity of changing in some instances division points, entailing the removal of employees, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after the approval.' " (*Northern Pacific Railway* v. *Washington*, 222 U. S. 379)

After the Congress had thus legislated prescribing the limitation of hours, and the period of postponement of such limitation, the State of Washington enacted a similar statute to become effective without delay. It was upon this state of facts that this court held the State act repugnant to the Federal Act, and for that reason invalid. In that particular case the conflict in purpose between the Federal statute and the State statute was clear.

> "The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the state must be answered by a judgment upon the particular case." (*Penn R. Co.* v. *Public Service Commission*, 250 U. S. 566, 569.)

In the particular case now before the Court, the statute itself, in contrast to the Hours of Service statute, makes no limitation of hours, and contains no provision directing action by the Commission. As to hours of service, Section 204(a) undertakes only to grant authority to the Commission to establish regulations when, as and if it shall deem regulations desirable. The *Larabee Mills case*, and the *Northwestern Bell Telephone Company case*, just cited, establish very clearly that such an enactment is not an occupation of the regulatory field which operates to exclude the exercise of State power.

The New Hampshire Statute is not a regulation of Interstate Commerce.

Neither the New Hampshire statute, nor the order of the New Hampshire Commission penalizing a violation thereof constitutes a regulation of interstate commerce; and there is no conflict between either and the Motor Carrier Act of 1935. The distinction between the two statutes is clearly pointed out in the report of the New Hampshire Commission as follows:

> "It is to be noted that the Federal statute grants authority to fix the maximum hours of service of all employees. The State law does not attempt to fix the maximum hours of service of any employees, but makes it unlawful to operate on the State's highways after a 12-hour period on duty. There is nothing in the State Law to prevent a driver working in a warehouse after a 12-tour tour of duty as only operation on the highway is restricted.
>
> "The purpose of the two provisions differ widely. Congress acted on that matter over which it clearly has authority—interstate commerce. The thing to be protected is that which is transported. The Federal Act does not mention highway safety generally, but restricts the provisions to safety of operation and equipment of vehicles engaged in interstate commerce. The State law is designed under the police powers of the State to protect the lives and property of all those who use its highways." (R. 9)

The Federal statute looks only towards a proper regulation of the hours of service of employees generally, and towards safeguarding persons and property transported. The New Hampshire statute looks towards protecting the lives and property of all who use the highways. It is a police law and not a regulation of commerce.

In sustaining an Alabama statute which forbade operation of a train in Alabama by one who had not upon examination proved his qualification and obtained a State license, this Court said:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." (*Smith* v. *Alabama*, 124 U. S. 465)

This Court has sustained State statutes forbidding the operation of trains on Sunday, (*Hennington* v. *Georgia*, 163 U. S. 299), regulating the heating of passenger cars in all railroad trains (*N. Y., N. H. & Hartford R. Co.* v. *New York*, 165 U. S. 620), forbidding the transportation of persons to infected areas (*Compagnie Francais* v. *Board of Health*, 186 U. S. 380,) and requiring a certain number of interstate trains to stop daily at towns of a given population (*L. S. and M. S. R. Co.* v. *Ohio*, 173 U. S. 285).

In *South Covington and Cincinnati Street Rwy. Co.* v. *Covington*, 235 U. S. 537, this Court, holding invalid certain sections of a city ordinance, for reasons stated, said:

"In numerous instances this Court has sustained local enactments, passed in the exercise of the police power of the state, in the interest of the public health and safety, notwithstanding the regulation may incidentally or indirectly affect interstate commerce. The subject was given much consideration in the Minnesota Rate Cases (Simpson v. Shephard, 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729), and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce * * * In the light of the principles settled and declared, the various provisions of this ordinance must be examined. That embodied in Secs. 1 and 6 makes it unlawful for the company * * * We

think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati and the manner of loading them when there * * * There are other parts of the ordinance which we are of opinion are within the authority of the state, and proper subject-matter for its regulation; at least, until the Federal authority is exerted. These are the provisions with reference to passengers riding on the rear platform unless the same be provided with a suitable rail or barrier, etc., and as to persons riding upon the front platform unless a rail or barrier be provided, separating the motorman from the balance of the front platform, as well as those provisions with reference to the requirement to keep the cars clean and ventilated and fumigated. We think these regulations come within that class in which this court has sustained the right of the local authorities to safeguard the traveling public, and to promote their comfort and convenience, only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands." (*South Covington and Cincinnati Street Rwy. Co.* v. *Covington*, 235 U. S. 546)

In *South Covington and Cincinnati Street Railway* v. *Kentucky*, 252 U. S. 399, sustaining the separate coach law of Kentucky in its application to interstate cars operated between Ohio and Kentucky, the Court referred to the case just cited, and said:

"The cited case points out the equal necessity, under our system of government, to preserve the power of the states within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty, and an interurban railroad company deriving its powers from the state, and subject to obligations under the laws of the state, should not be permitted to exercise the powers given by the state, and escape its obligations to the state, under the circumstances presented by this record, by running its coaches beyond the state lines. (*South Covington and Cincinnati Rwy. Co.* v. *Kentucky*, 252 U. S. 404)

A State law enacted in the exercise of the police power may be held superseded by a Federal statute only to the extent that such law interferes with or is contrary to the Federal statute.

The basis upon which State laws, enacted in the exercise of a reserved power may sometimes be held ineffective was stated in *Gibbons* v. *Ogden,* 9 Wheaton 1, as follows:

> "The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." (*Gibbons* v. *Ogden,* 9 Wheaton 211.)

The cases which illustrate application of this principle were reviewed in the *Minnesota Rate Cases,* 230 U. S. 352, and the applicable rule was stated as follows:

> "Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and for this purpose and

> to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible." (*Minnesota Rate Cases,* 230 U. S. 352)

It will be noted that the Court, in recognizing the power of Congress to supersede State statutes enacted in the exercise of a reserved power, indicates that this may be done only in cases where necessary for the accomplishment of some constitutional purpose, and that such power goes no further than the "conviction of national need" entertained by the Congress. Congress alone holds power to judge of the necessity for striking down State legislation; and that power must be exercised by it. The power to strike down goes no further than the "conviction of national need," manifested by the Congress.

Congress may determine what state of facts constitute the necessity before which State laws shall give way, but it must be found, in the manner provided by Congress, that the facts exist which Congress has declared to constitute necessity. An application of this principle was made in *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway,* 281 U. S. 412. In that case the United States District Court had enjoined rates prescribed by the North Dakota Commission. No finding that the rates constituted an undue discrimination against interstate commerce, in violation of Section 13 of the Interstate Commerce Act, had been made by the Interstate Commerce Commission. This Court set the injunction aside because of the lack of a finding establishing a violation of the standard prescribed by Congress. In its opinion the Court cited the *Minnesota Rate Cases,* 230 U. S. 352, where the finding required by the statute, applicable in that case, had not been made, and the State law had been sustained, and also the *Shreveport case,* 234 U. S. 342, where a contrary situation existed, and the State law was held no longer effective. The Court said:

"What was lacking in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, had been supplied in the Shreveport Case (234 U. S. 342, 15 L. ed. 1341, 34 Sup. Ct. Rep. 833). There, the Interstate Commerce Commission had found that there was an unjust discrimination arising out of the relation of intrastate rates, maintained under state authority, to interstate rates which had been upheld as reasonable. The court decided that Congress in exercising its constitutional authority, could correct the evil of this discrimination against interstate commerce, and that in so doing Congress was entitled to secure the maintenance of its own standard of interstate rates. Having this power, Congress could provide for its exercise through the aid of a subordinate body. The removal of the discrimination was within the authority granted to the Interstate Commerce Commission, and the decision rested upon the ground that this authority has been exercised." (*Bd. of R. Comrs.* v. *Great Northern R. Co.*, 281 U. S. 424)

"It is said that the interlocutory injunction, granted below, was in aid of the proceedings pending before the Interstate Commerce Commission. But the injunction necessarily has the effect of preventing the state from enforcing the rates it has prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. A judicial restraint of the enforcement of intrastate rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the state to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the state authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created. Congress forbids the unjust discrimination through the fixing of intrastate rates but entrusts the appropriate enforce-

ment of its prohibition primarily to its administrative agency." (*Bd. of R. Comrs.* v. *Great Northern R. Co.*, 281 U. S. 430)

Again in *Florida* v. *United States*, 288 U. S. 193 this Court held an order of the Interstate Commerce Commission prescribing intrastate rates invalid because findings necessary under the Act to establish the jurisdiction of the Commission to make such order had not been made. In its opinion the Court said:

> "The question in the present cases, then, is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear. Illinois C. R. Co. v. State Public Utilities Commission, 245 U. S. 493." (*Florida* v. *United States*, 282 U. S. 211.)

Congress in the Motor Carrier Act has established no standards for the government of the Interstate Commerce Commission in the promulgation of regulations to displace State police laws.

Congress can not delegate the power to promulgate regulations to have the force of law without establishing standards to which such regulations shall be made to conform.

This question of the delegation of legislative power was very fully considered by this Court in a recent case; and the applicable authorities from the beginning of our national history were reviewed. It is sufficient to refer to that case, which was *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Acting under Section 9(c) of the National Industrial Recovery Act, the President had prohibited the interstate transportation of certain petroleum and petroleum products. Said section provided in part as follows:

> "(c) The President is authorized to prohibit the transportation in interstate and foreign commerce of

petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage from any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State."

Having reviewed the applicable cases the court said:

"Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that Sec. 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

"If Sec. 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government." (293 U. S. 430)

In the Motor Carrier Act the Congress has declared no policy, and established no standards, as respects requirements to be imposed to govern "qualifications and maximum hours of service of employees, and safety of operation and equipment."

In this respect the Motor Carrier Act is in direct contrast to acts of Congress designed to establish regulations for the government of rail carriers.

In the Hours of Service Act of March 4, 1907, 34 Stat. L. 1415, a limitation of hours was declared by the Act.

In the Safety Appliance Act of March 2, 1893, 97 Stat. L. 531, the standards imposed were set forth in the Act. The provision in Section 5 authorizing certification by the American Railway Association to the Interstate Commerce Commission of the standard height of drawbars was claimed to be a departure from this principle; but it was held otherwise in *St. L. I. M. and S. R. R.* v. *Taylor*, 210 U. S. 28. Uniformity in height was required by the statute. That was the standard established. What the height should be was a mere detail left to be determined and announced by the Commission. That this was the principle upon which the decision rested is shown by the cases cited by the court as decisive. These were *Union Bridge Co.* v. *United States*, 204 U. S. 364, and *Buttfield* v. *Stranahan*, 192 U. S. 470.

The *Union Bridge Co. case* involved a statute in which Congress empowered the Secretary of War to require removal of any structure in any navigable stream found by him to constitute an "unreasonable obstruction" to free navigation "on account of insufficient heighth, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span." These tests were held sufficiently definite standards for the government of the Secretary of War in enforcing the rule of free navigation declared by Congress.

Buttfield v. *Stranahan* was declared by the Court to be "completely in point." In that case in Section I of the Act, the Congress declared the character of tea, the importation of which was made unlawful, and by Section 3 gave to the Secretary of the Treasury the mere executive duty to effectuate the policy declared in the statute. (192 U. S. 496.)

In the act of April 14, 1910, to Supplement the Safety Appliance Act, 36 Stat. L. 298, the Congress in Section 2 prescribed the character of appliances with which cars should be equipped, and in Section 3 provided that the Com-

mission, after hearing, should designate "the number, dimensions, location and manner of application of the appliances provided for by Section 2."

In the National Labor Relations Act of 1935, 49 Stat. L. 449, Congress defined the unfair labor practices made unlawful by the Act, and it was the standards thus established by Congress which the Labor Board was empowered to enforce. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 47.

What the Congress attempted to do in Section 204(a) of the Motor Carrier Act is similar in all respects to what was attempted by the legislature of Iowa in the statute held unconstitutional by the Supreme Court of that State in *Goodlove* v. *Logan*, 217 Ia. 98, 251 N. W. 39. That statute provided:

> "The state highway commission shall, for the protection of the highways and the safety of the traffic thereon, establish rules and regulations and issue orders relative to the use of the primary roads or any part thereof and of those portions of extensions of primary roads built and maintained by the state within cities and towns. Such rules and regulations may, where the matter is not otherwise covered by statute, relate to * * * the stopping of vehicles on the paved portion of the roadway, and the stopping of vehicles on any portion of primary roads for service at wayside markets or filling stations. * * *"

Carefully reviewing State decisions, and decisions of this court bearing upon the question involved, the Supreme Court of Iowa said:

> "If the Legislature had a right to pass section 5066, granting to the highway commission the authority to adopt rules and regulations governing the stopping of cars upon a paved highway, the Legislature can also empower the highway commission to pass rules and regulations governing the speed and right of way, and all duties of automobile drivers. * * * Thus, it seems to us that the Legislature under Code Sec. 5066 has left to the highway commission first to say whether there

shall be any law, and, second, what that law shall be. This is a delegation of legislative power, and is unconstitutional." (*Goodlove* v. *Logan,* 251 N. W. 43)

See also *Ex Parte McLain,* 190 Calif. 376, 212 Pac. 620, where a statute authorizing a highway commission to fix the maximum speed of travel across highway bridges was held unconstitutional on like grounds.

In *State* v. *Larson,* 10 N. J. Miscl. 384, 160 Atl. 556, the New Jersey Court of Oyer and Terminer held unconstitutional an act which undertook to authorize an aviation commission of that State to "establish and revise from time to time air traffic rules for the navigation, protection and identification of aircraft which shall conform to and coincide with, insofar as is practicable (the provisions of Federal statutes) * * *," and provided further, "It may encourage and effect, insofar as is practicable, uniform field rules for airports." The Court said:

> "Our form of government, both federal and state, is based upon the fundamental concept of the separation of the powers, legislative, executive, and judicial. * * * But, while the establishment of principles or standards of conduct is the essential function of the lawmaking body, which cannot be delegated, the application of those principles or standards to facts as they arise, and the determination as to whether or not those facts exist, is a function of law enforcement, which can therefore be delegated to an administrative body. This distinction is well brought out in the leading case of Field v. Clark, 143 U. S. 649, 12 S. Ct. 495, 505, 36 L. Ed. 294, where the court says: 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.' See further the comparatively recent case of Hampton, Jr. & Co. v. U. S., 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624, which collates the authorities generally in this regard. Accordingly, Congress in exercising legislative control over intrastate carriers by the fixing of general principles can yet

delegate fact-finding and law-enforcing, i. e., rate making, power to the Interstate Commerce Commission. Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452, 30 S. Ct. 155, 54 L. Ed. 280. So again the state of New Jersey can delegate rate-making power to the State Public Utilities Commission. W. J. & S. Railroad v. Board of Public Utility Commissioners, 87 N. J. Law, 170, 94 A. 57. A delegation of power over transportation by air can, of course, be made similar to that over transportation by land or water. But this is exactly what the State Aviation Act fails to do. As seen above, it fixes no criterion whatever to be adhered to by the state aviation commission in establishing its regulations for 'uniform field rules.' In authorizing such regulations, it therefore violates the fundamental concept of our constitutional law as to the separation of the powers."

Public highways are instrumentalities of government; and State laws made to secure their preservation and safe use may not be destroyed by Congress.

The duty to protect its citizens is a paramount duty of every civilized state. The power to provide such protection is among the first of those preserved to the State by the 10th amendment. The power to maintain their instrumentalities of government is another of those powers reserved under the constitution.

This latter power is not subject to destruction by Congress. The Federal government may not levy taxes on such instrumentalities lest they be crippled or destroyed.

"The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme: but the States within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved,' are as independent of the General Government as that government within its sphere is independent of the States. * * * Such being the sepa-

rate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the General Government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operation of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax." (*Buffington* v. *Day*, 78 U. S. 113)

The principle involved was applied in *Ambrosini* v. *United States*, 187 U. S. 1, to bonds required to be given by licensees as prerequisites to the issuance of liquor licenses. It was held that such bonds were instrumentalities of the State government, and not subject to the requirement of the Federal revenue law. In its opinion the court said:

"The general principle is that, as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the general government. It rests on the law of self-preservation, for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter." (*Ambrosini* v. *United States*, 187 U. S. 1, 6.)

Public highways are indispensable instrumentalities of government in every civilized State. Without them the most obvious functions of government could not be performed. It is not too much to say that without highways society as we know it could not exist, and the State itself could not exist.

Being, then, indispensable instrumentalities of government, the States not only have the right to maintain highways, but they have the right to make laws for their preservation, and to enable their safe use for the public purposes for which they are maintained.

This is not to say that Congress may not enact laws which it shall find to be necessary to protect the freedom of movement of interstate commerce upon the highways, and otherwise to regulate such commerce; but such laws must stop short of destruction of the right of a State to maintain its highways, and to keep them safe.

The results which might flow from sustaining the contention of the appellant respecting the effect of the enactment of the Motor Carrier Act, 1935, were pointed out in the report of the New Hampshire Commission as follows:

> "If the argument of the respondent is sound, then as the Federal statute provides for reasonable requirements as to 'safety of operation and equipment' interstate carriers are now free to run without lights, brakes, etc., to run through red lights, ignore all local and State speed restrictions, pass cars on hills, and violate all other State laws and City and Town ordinances governing safety of operation and equipment." (R. 9)

The authority granted to the Interstate Commerce Commission in said Section 204(a) was not designed to empower the Commission to displace State police regulations established for the protection of the highways, and of persons and property thereon.

Displacement of State police regulations governing use of the highways is not necessary to a proper regulation of interstate commerce moving upon such highways; and properly construed the Motor Carrier Act does not contemplate any such displacement.

Nothing except the clearest language would be taken to express an intent to displace the ordinary police laws of the States within which interstate carriers may operate.

Such displacement of local laws in practical effect would free interstate carriers from all effective police restraint.

No rules which might be substituted,—if such substitution may constitutionally be made,—to be enforced through the Bureau of Motor Carriers of the Interstate Commerce Commission by prosecutions in the Federal courts would be an adequate substitute for local laws enforced by local officials in the local courts.

If it be true that even the laws of a State enacted for the preservation of public safety upon the highways must yield to the rule expressed in *Gibbons* v. *Ogden* and in the *Shreveport case*, cited *supra*, yet Congress is by the constitution obligated to refrain from unnecessarily destroying any of the reserved powers of the States. Every statute must be construed in the light of this constitutional restraint. Intent on the part of Congress to observe such restraint is always presumed.

Accordingly it is a settled rule in the construction of Federal statutes enacted under the commerce clause "that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." (*Illinois Central R. R.* v. *Public Utilities Commission*, 245 U. S. 493, 510 and cited cases)

Especially is this rule applicable in cases where State laws designed for the protection of the public safety are involved. The general rule was succinctly stated in the opinion of the dissenting Justices in *Leisy* v. *Hardin*, 135 U. S. 100, as follows:

> "The protection of the safety, the health, the morals, the good order and the general welfare of the people is the chief end of government. *Salus populi suprema lex.* The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments. The Constitution of the United States and the laws made in pur-

suance thereof being the supreme law of the land, all statutes of a State must, of course, give way, so far as they are repugnant to the National Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the Congress of the United States, to subordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce." (135 U. S. 100)

Said Section 204(a) of the Motor Carrier Act is open to two possible constructions. One is that placed upon it by the New Hampshire Commission, which would attribute to the Act an intent to restrict the authority granted to the making of rules for the protection of vehicles themselves, of their operators and of passengers and cargoes. The other construction would be that contended for by the appellant which would attribute to the Act an intent to authorize the making of regulations designed to protect the lives and property of all those who use the highways, and the highways themselves, so far as highways might be affected by improper driving and operation. Unsafe operation obviously would include the overloading of vehicles.

There is nothing in the Motor Carrier Act to indicate an intent to impose regulation for the purpose of protecting the safety of the general public. In the declaration of policy, in Section 202(a), there is nothing respecting safety. Other provisions of the Act make it evident that preservation of the public safety and of the highways were not among the purposes aimed at in the Act. Furthermore the proviso included in Section 208(a) and the similar proviso in Section 209(b) prevents the Interstate Commerce Commission from limiting the number of vehicles which a carrier may operate once a certificate or permit has been granted. The proviso in Section 208(a) is as follows:

"* * * *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the

routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

In view of this express limitation upon the Commission's power, in view of the complete absence of any provision in the Act indicating an intent on the part of Congress that the regulation provided should be directed towards protecting the safety of persons and property upon the highways, and towards protecting the highways themselves, and in view of the serious consequences which would result from a destruction of the police power of a State to afford such protection, the construction contended for by the appellant can not be accepted.

If Congress had in mind any legislation affecting State police powers in that field, it determined to postpone enactment of the same until the Commission, under the provisions of Section 225, might report to the Congress as to the need for Federal regulation.

What the court said in *South Carolina Highway Commission* v. *Barnwell Bros.*, Supreme Court Advance Opinions, L. ed. Vol. 82, page 469, is applicable in this case. In that case it was contended that a statute of South Carolina limiting the size and weight of motor trucks operating upon the highways had been superseded by the Motor Carrier Act of 1935. In its opinion, sustaining the validity of the statute, this Court said:

"While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412, and Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. * * * Few sub-

jects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against against their abuse. * * * Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought." (*South Carolina State Highway Department* v. *Barnwell Brothers*, Supreme Court Advance Opinions, Vol. 82, page 469.)

If the States are exercising their reserved powers to regulate carriers in these matters to the substantial injury of interstate commerce, so that some limitation of that exercise is thought by the Commission to be necessary, report can be made under Section 225, and Congress can take such considered action as is within its constitutional power.

Appellant's construction of the Motor Carrier Act would deprive the States of power to protect public safety on the highways, and would convert the United States District Courts into petty police tribunals.

The extent to which the destruction of the police power of the States, in so far as they apply to interstate motor carriers, would be carried by the construction of Section 204 (a) contended for by the appellant may be indicated by directing attention briefly to a few of the rules and regulations which have been promulgated by the Interstate Commerce Commission under Section 204 (a).

We accordingly quote briefly from the reports of the Commission and from such rules and regulations.

In *Motor Carrier Safety Regulations, Ex Parte* MC-4, 1 I. C. C. Motor Carrier Cases, 1, 4, 8-9, the Commission said:

> "The task of establishing highway safety regulations on a national scale is not an easy or a simple one. Hitherto, the several States have exercised jurisdiction over these matters, and a very pronounced lack of uniformity has been the unavoidable result.
>
> "A few States have built up, through the years, regulatory organizations which are able to exercise close control over carriers, drivers, and equipment, basing their activities upon detailed laws or regulations as to examinations, mechanical specifications and inspection, and the like. Other States have more general requirements, with limited funds and personnel to make them effective. Still others exert little or no control over motor-carrier operations from a safety standpoint. * * * The basic rule with respect to speed (rule 7) is contained in nearly all State speed laws. * * * We are of the opinion that no completely satisfactory solution has yet been found for the problem of controlling motor-vehicle speed upon the open highway. Accordingly, after careful study of all the evidence submitted, and in the absence of adequate data or unified opinion among competent authorities, we have been impelled to refrain for the present from specifying a limit in miles-per-hour speed. The subject will receive our closest attention in the light of our continuing experience. The

'basic rule' remains: Speed at no time should be greater than is reasonable or prudent under the existing conditions.

"Rule 13 omits a specified distance to be maintained between vehicles moving in the same direction, in favor of a more reasonable rule requiring drivers to keep a sufficient distance behind a preceding vehicle so as not to interfere with overtaking traffic."

The following quotations are from the rules and regulations contained in the order made in the case just cited, attached to and a part of the Commission's report—

"RECKLESS DRIVING.

4. No motor vehicle shall be driven recklessly, or so as to endanger life, limb, or property.

* * * * * * * * *

6. No driver shall go on duty while under the influence of, nor drink while on duty, any alcoholic liquor or beverage; nor shall he knowingly be permitted so to do.

SPEED.

7. No motor vehicle shall be driven at a speed greater than is reasonable and prudent, having due regard to weather, traffic, intersections, width and character of the roadway, type of motor vehicle, and any other conditions then existing; but in no event shall a motor vehicle be driven in or through any State, legal subdivision thereof, or the District of Columbia at a speed greater than that permitted by such State, legal subdivision thereof, or the District of Columbia.

* * * * * * * * *

DRIVING.

12. Every motor vehicle shall be driven as far to the right side of the traveled portion of the highway as is practicable.

13. Sufficient space shall be maintained, whenever conditions permit, between vehicles proceeding in the same direction so that an overtaking vehicle may enter and occupy such space without danger. * * *

14. Every motor vehicle transporting passengers, high explosives, or poisonous or compressed inflam-

mable gases, and every motor vehicle use for the transportation of inflammable or corrosive liquids in bulk, whether loaded or empty, shall, upon approaching any railroad grade crossing, be brought to a full stop within 50 feet, but not less than 10 feet, from the nearest rail of such railroad grade crossing, and shall not proceed until * * *

18. No motor vehicle shall be driven past a vehicle or vehicles proceeding in the same direction, unless there is ample visible space ahead to do so without endangering any other user of the highway; if necessary, an audible signal of intention to pass shall be sounded. * * *

19. The speed of a motor vehicle shall not be increased to prevent being overtaken by another vehicle attempting to pass.

20. No motor vehicle shall be driven upon a down grade with gears in neutral or clutch disengaged.

21. Any motor vehicle when meeting or overtaking any school or other bus discharging or taking on passengers shall proceed with extreme caution and only if the course ahead is known to be clear.

STOPPING.

22. No motor vehicle shall be stopped, parked, or left standing, whether attended or unattended, upon the traveled portion of any highway outside of a business or residence district, when it is practicable to stop, park, or leave the motor vehicle off the traveled portion of such highway. * * *

* * * * * * * * * *

25. On every motor vehicle operated upon the highways, all lamps required by the regulations of the Commission shall be lighted during the period from one-half hour after sunset to one-half hour before sunrise, and * * *

IN CASE OF ACCIDENT.

32. The driver of any motor vehicle involved in an accident resulting in death, personal injury, or property damage shall forthwith stop at the scene of the accident and remain there until he shall have (a) rendered all possible assistance to injured persons; and (b) given

to any person demanding the same his name and address * * *

SECTION A—LIGHTING DEVICES AND REFLECTORS.

(1) (a) On every bus or truck whatever its size, there shall be the following lighting devices and reflectors. * * *

SECTION B—BRAKES.

(1) Every bus, truck, and truck tractor shall be equipped with brakes adequate to control the movement of, and to stop and to hold such vehicle, including two separate means of applying the brakes * * *."

The foregoing regulations were issued by order of the Commission in December 23, 1936 to become effective July 1, 1937.

The quotations following are from the report of the Commission in Ex Parte No. MC-2, *In the Matter of Maximum Hours of Service of Motor Carrier Employees,* 3 I. C. C. Motor Carrier Cases, 665, and from the order of the Commission, upon rehearing in that proceeding, which order is reported in 6 I. C. C. Motor Carrier Cases 1,

"STATE LAWS ON MAXIMUM HOURS.

The testimony and exhibits submitted at the hearings disclose that 43 States and the District of Columbia have enacted laws prescribing a maximum limit on the hours of service of drivers of for-hire motor vehicles or granting authority to a State agency to promulgate regulations under which hours of service have been prescribed. * * * The regulations hereinafter set forth prescribe, for the reasons herein indicated, a higher daily maximum of work or driving hours than is laid down in the laws or regulations of 9 of the 43 States. Under the laws of 34 States, however, it is possible to drive or work a daily maximum equal to or in excess of that herein prescribed. * * * In prescribing these regulations we confine them, for reasons previously stated, to maximum hours for drivers of motor vehicles operated by common and contract carriers in the transportation of property or passengers in interstate or

foreign commerce. We desire to make it entirely clear that these regulations are only an initial step. * * * Conditions are rapidly changing in the motor-carrier industry and there may be many factors which will demonstrate that the limits now found reasonable will not be reasonable at some future date. It is also to be borne in mind that we here prescribe only the maximum hours for drivers and not the actual hours. There is nothing to prevent carriers from establishing, either by agreement with their employees or otherwise, lesser hours, as they have frequently done in the past." (3 I. C. C. Motor Carrier Cases, 683, 686.)

"RULE 1

* * * * * * * * * *

(b) The term 'driver' means any individual who drives in transportation in interstate or foreign commerce any motor vehicle as defined in paragraph (a) above. * * *

"RULE 3

(a) No carrier subject to these regulations shall permit or require any driver in his employ to remain on duty, as defined in paragraph (c) of rule 1, for a total of more than 60 hours in any week, as defined in paragraph (e) of rule 1; provided, however, that carriers operating vehicles on every day of the week may permit drivers in their employ to remain on duty for a total of not more than 70 hours in any period of 192 consecutive hours.

(b) No carrier subject to these regulations shall permit or require a driver in his employ to drive or operate a motor vehicle for more than 10 hours in the aggregate in any period of 24 consecutive hours, unless such driver be off duty for 8 consecutive hours during or immediately following the 10 hours aggregate driving and within said period of 24 consecutive hours; provided, however, that two periods of resting or sleeping in a berth, as defined in paragraph (g) of rule 1, may be cumulated to give the aforesaid total of 8 hours off duty.

"RULE 4

No carrier subject to these regulations if himself a driver shall remain on duty or drive or operate for

> longer periods than those prescribed in rule 3 hereof for employed drivers." (6 I. C. C. Motor Carrier Cases 1, 10, 11)

Regulations in *Ex Parte MC-2* were originally issued on December 29, 1937 to become effective July 1, 1938. The effective date of the order, however, was later postponed, and the order was reissued on July 12, 1938, to become effective October 1, 1938. It has since been further postponed, and at the date of the preparation of this brief stood to become effective December 31, 1938.

The appellant's brief contains the following paragraph:

> "In its report of this case below, the Public Service Commission of New Hampshire emphasized the argument that if the appellant's contention was accepted, the field of hours of service in interstate motor transportation would be left unregulated. The answer to this argument is not difficult to suggest, for as Mr. Justice Brandeis said in *Napier* v. *Atlantic Coastline Railroad Co.*, 272 U. S. 605, 613
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> > 'If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample.' "

The paragraph of the report of the New Hampshire Commission here referred to we have already quoted. It pointed out that if the appellant's construction was accepted, not only would the hours of service of drivers of interstate carriers be left unregulated, but such carriers would be free to ignore all State laws and City and Town ordinances governing safety of operation and equipment. The appellant recognizes that this is true, as it must. The quotations from the reports and orders of the Interstate Commerce Commission which we have heretofore included in this brief indicate that said Commission entertains the view that the appellant's construction is correct. "*Hitherto*", that Commission says in *Motor Carrier Safety Regulations*, cited *supra*, "the several States have exercised jurisdiction over these matters * * *".

Such a construction of the Motor Carrier Act of 1935 is nothing short of staggering. If it is sound, it means that the people of the States may no longer look to their law enforcement officers and to their local courts for protection against lawless actions of interstate motor carriers. They must look to the Interstate Commerce Commission for laws, in the form of regulations, and to the Bureau of Motor Carriers of that Commission for enforcement, and to the Federal courts for the infliction of penalties for violations of such laws as the Interstate Commerce Commission may make.

This prospect is not disturbing, in the view of the appellant, as set forth in its brief. "The Commission's power is ample", the brief asserts, quoting language from an opinion of this court applying to a very different situation.

Law enforcement is considerably more difficult than law making. The single excursion which the Federal government has made into the field of enforcement of police regulations proved pretty conclusively that Federal bureaus can not be depended upon to do work of that character very satisfactorily, and that our Federal courts can not be converted into petty police tribunals without largely impairing their efficiency for the disposition of the character of litigation for which they were designed.

It is unthinkable that Congress ever designed the Motor Carrier Act to receive any such construction as that contended for by the appellant. At least such construction of the Act is doubtful, and must be rejected under well-settled rules of construction.

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware & H. Co.*, 213 U. S. 366, 407, 408. *State of Texas* v. *Eastern R. R. Co.*, 258 U. S. 204, 217.

Acts which violate Federal regulations governing the operation of interstate motor carriers may be punishable under both Federal and State laws.

It is well established that the same act may be an offense against the Federal government and likewise against a State, under Federal and State laws penalizing such act. Criminal prosecutions under both Federal and State prohibition laws have not been uncommon. The validity of State laws under which State prosecutions were maintained for acts likewise prosecuted by the Federal government did not depend upon Section 2 of the 18th Amendment, providing for "concurrent power to enforce this Article (the 18th Amendment) by appropriate legislation." It depended upon the inherent police power of the States preserved to them under the constitution. This was clearly stated by this court in *United States* v. *Lanza*, 260 U. S. 377, and again in *Hebert et al.* v. *Louisiana*, 272 U. S. 312, as follows:

> "To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of country-wide prohibition, state power would be excluded. In effect the 2d section of the 18th Amendment put an end to restrictions upon the state's power arising out of the Federal Constitution, and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the 1st section of the Amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging

to the states, preserved to them by the 10th Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. (260 U. S. 381)

In *United States* v. *Marigold*, 9 Howard 560, the respondent was held liable to prosecution under an Act of Congress for uttering counterfeit coins, notwithstanding the fact that in *Fox* v. *Ohio*, 5 Howard 410, the court had upheld a conviction under an Ohio statute, making the uttering of counterfeit coin unlawful. It was contended that the same act could not be a crime against both Federal and State governments, but the Court said:

> "The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose as assigned by the framers of that instrument of creating and preserving the uniformity and purity of such a standard of value; and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power. * * * With the view of avoiding conflict between the State and federal jurisdictions, this court in the case of *Fox* v. *The State of Ohio* have taken care to point out, that the same act might as to its character and tendencies, and the consequences it involved, constitute offense against both the State and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." (9 Howard 567, 569).

Violation of election laws and forgery are acts which may likewise be offenses against the two sovereignties. *Ex Parte Seibold*, 100 U. S. 390, *Pettibone* v. *United States*, 148 U. S. 209, *Cross* v. *North Carolina*, 132 U. S. 131. In the *Seibold case* the Court said

"As a general rule, it is no doubt expedient and wise that the operations of the State and National Governments should, as far as practicable, be conducted seperately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. * * * Generally, the powers given by the Constitution to the Government of the United States are given over distinct branches of sovereignty from which the State Governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated; that of the State, however being subordinate to that of the United States, whereby all question of precedency is eliminated. * * * It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress had made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with state laws and regulations with the duties of state officers, or with local prejudices. * * * This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time."

CONCLUSION.

The New Hampshire Commission construed Section 204 of the Motor Carrier Act of 1935 as intended to authorize the Commission to promulgate only regulations designed to secure the safety of motor carrier employees, and their vehicles, and the passengers and cargoes transported in interstate commerce. That construction is in harmony with the presumption that Congress has endeavored to guard against "any unnecessary interference with State laws and regulations." Under such construction acts violative of any

valid regulations promulgated under said section may be punished as provided by Federal law, and if violative of the police laws of a State, may likewise be punished in the courts of the State.

In any event, for the various reasons hereinbefore set forth there has been no occupation of the field of hours of service regulation, as respects drivers of vehicles of motor carriers which has operated to supersede New Hampshire laws applicable thereto.

Respectfully submitted,

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December 16, 1938.

SUPREME COURT OF THE UNITED STATES.

No. 295.—October Term, 1938.

H. P. Welch Company, Appellant, vs. The State of New Hampshire. } Appeal from the Supreme Court of the State of New Hampshire.

[January 30, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

A statute of New Hampshire[1] declares unlawful the operation on its roads of motor vehicles for specified transportation by drivers who have been continuously on duty for more than 12 hours. By this appeal we are called on to decide whether, as applied in this case, §§ 3, 4, and 8 are repugnant to the equal protection clause of the Fourteenth Amendment, and whether §§ 8 and 11 were superseded by the federal Motor Carrier Act, 1935, § 204,[2] and regulations prescribed under it by the Interstate Commerce Commission.

The New Hampshire Act declares that the number of motor vehicles operated by carriers for hire has made regulation necessary to the end that its highways may be safer for use by the general public. § 1. It requires common and contract carriers between points within the State to register their trucks with the public service commission. § 2. Contract carriers include those, other than common carriers, who haul for hire by motor vehicle on any road of the State. § 3. Exempted from the challenged regulation are those transporting products of their own manufacture or labor (§ 3), and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town or within 10 miles of its limits or beyond the 10-mile limit on not more than two trips in 30 days. § 4.

Section 8 declares that "It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property

[1] Laws 1933, c. 106 as amended by c. 169.

[2] 49 Stat. 546; 49 U. S. C. § 304.

for hire on the highways of this State when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this State until he shall have had at least eight consecutive hours off duty." Section 11 provides that for violations of the Act the commission shall have authority after notice and hearing, to suspend or revoke any registration certificate.

Appellant is a Massachusetts corporation doing intrastate and interstate business as a common and contract carrier of freight for hire by motor vehicles over public highways in that State and in New Hampshire. Approximately 99 per cent of its business is interstate. It has terminals at Boston in Massachusetts, and at Manchester, Concord, and Claremont in New Hampshire. In 1937 it obtained from the New Hampshire commission registration certificates for 20 trucks. After notice and hearing, the commission, in a decision filed as of December 11, 1937, held appellant had violated the provisions of § 8 and ordered that its certificates be suspended for five days. Appellant appealed to the state supreme court. That court upheld the challenged provisions and dismissed the appeal. 89 N. H. —.

1. Sections 3, 4, and 8 are not repugnant to the equal protection clause. The state court found that the purpose of § 8 is "to protect users of the highways of this State from the danger likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue." Appellant's contention is that the discrimination between drivers of motor carriers for hire subject to § 8 and those exempted by §§ 3 and 4, has no fair or substantial relation to highway safety. It suggests, and we may assume, that the roads of New Hampshire are extensively used for transportation by trucks not regulated by § 8; that drivers of them are just as susceptible to fatigue from long hours of continuous operation as are those operating the trucks used by appellant and other common carriers for hire, and that the dangers attributable to fatigued drivers are the same in one class of service as in another. Appellant has failed to show that, in operations to which § 8 applies, continuous driving for more than 12 hours is not so much more prevalent than in those exempted (§§ 3, 4) as to constitute a reasonable basis for the

differentiation. We are of opinion that, for reasons given above, those stated by the state supreme court in this case and by this Court in *Dixie Ohio Express Co.* v. *Georgia Comm'n*, decided this day, the classification in question does not conflict with the rule of equal protection.

2. As applicable to the violations of the state law found to have been committed by appellant, §§ 8 and 11 were not superseded by the federal Motor Carrier Act, 1935, or the regulations made under it by the Interstate Commerce Commission.

That Act became law August 9, 1935. Under the caption "General Duties and Powers of the Commission", § 204(a) declares: "It shall be the duty of the Commission . . . to regulate" common and contract carriers by "motor vehicle . . . and to that end the Commission may establish reasonable requirements with respect to . . . qualifications and maximum hours of service of employees, and safety of operation and equipment." By order made under authority of that section December 29, 1937, the Commission prescribed regulations as to maximum hours of service of drivers of motor vehicles operated in interstate commerce by common and contract carriers.[3] These regulations were modified July 12, 1938[4] and their effective date has been postponed to January 31, 1939.[5] With exceptions that need not be stated here, they declare that no common carrier shall permit or require any driver to remain on duty for more than 60 hours a week or more than 10 hours in any period of 24 consecutive hours.[6]

Appellant does not suggest that prior to congressional action the State was without power, for protection of persons and property, to regulate use of its roads as provided in § 8, and to enforce obedience in accordance with § 11. *Cooley* v. *Board of Wardens*, 12 How. 299, 320. *Smith* v. *Alabama*, 124 U. S. 465. *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514. The violations for which the state commission suspended appellant's registration certificates occurred after the effective date of the federal Act and before the Interstate Commerce Commission made its order. Without so deciding, we assume, so far as concerns the periods of continuous service condemned by the state commission, that when the federal

[3] 3 M. C. C. 665.

[4] Ex Parte No. MC-2, July 12, 1938.

[5] 5x Parte No. MC-2, December 22, 1938.

[6] Ex parte No. MC-2, July 12, 1938 [Rule 3(a) and (b)].

regulations take effect they will operate to supersede the challenged provisions of the state statute. Then, the sole question is whether Congress intended that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in interstate commerce. Our decisions provide no formula for discovering implied effect of federal statutes upon state measures such as that under consideration. Here, the way is made clear by the language and context considered in connection with existing conditions. Section 204(a) definitely imposes upon the Commission the duty to "regulate" but merely authorizes it to establish reasonable requirements with respect to, inter alia, qualifications and maximum hours of service of employees and safety of operation and equipment. The distinction intended between duty imposed and action permitted is more striking in view of the matters that, along with qualifications and hours of service of drivers, are committed to the discretion of the Commission. They include transportation of baggage and express, uniform systems of accounts, records, and reports, and preservation of records.

The roads belong to the State. There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians, and the like. Unquestionably, reasonable regulation of periods of continuous driving is an appropriate measure. In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. *Mintz* v. *Baldwin*, 289 U. S. 346, 350. The rule applicable is clearly stated in *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 510: "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." We have frequently applied that principle. See e. g. *Reid* v. *Colorado*, 187 U. S. 137, 148. *Missouri Pacific Ry.* v. *Larabee Mills*, 211 U. S. 612, 621 et seq. *Missouri, Kansas & Texas Ry. Co.* v.

Harris, 234 U. S. 412, 418-419. *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 139. *N. W. Bell Tel. Co.* v. *Ry. Comm'n*, 297 U. S. 471, 478. *Kelly* v. *Washington*, 302 U. S. 1, 10 et seq. Appellant cites *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370, 378; *Erie R. R. Co.* v. *New York*, 233 U. S. 671; *Oreg.-Washington Co.* v. *Washington*, 270 U. S. 87; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 613; and *Missouri Pacific* v. *Porter*, 273 U. S. 341, 345. In each, the facts differ so widely from those of the case before us that no discussion is required to show that it is not in point.

Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.